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Consultor Jurídico de Negociaciones

Mexico City, 18 January 2002

RE: *ADF Group Inc. vs. United States of America,*
ICSID Case No. ARB(AF)/00/1

Members of the Tribunal
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ARTICLE 1128 SUBMISSION
OF THE UNITED MEXICAN STATES

Pursuant to Article 1128 of the NAFTA, the Government of Mexico makes the following submission on the interpretation of the NAFTA. Mexico takes no position on the facts of this dispute and the fact that a legal issue arising in the proceeding is not addressed in this submission should not be taken to constitute Mexico's concurrence with a position taken by either of the disputing parties.

I. THE GOVERNING LAW

NAFTA Article 1131 sets out the governing law of the proceeding. Under paragraph 1 of the Article, the Tribunal must apply the Agreement and applicable rules of international law. In addition, paragraph 2 of the Article requires the Tribunal to apply an interpretation of any provision rendered by the Free Trade Commission (FTC). Accordingly, in the context of this dispute, the 31 July 2001 Interpretative Note of the Commission is part of the governing law.

Mexico observes that the Claimant's assertions that provisions of the NAFTA must "be read purposefully and in a large and liberal manner" and "'read up' to the task of obtaining the stated objectives" is without foundation under the Vienna Convention on the Law of Treaties and general international law. The Vienna Convention rejected the "teleological" or "effective" approach to treaty interpretation, which gives greater weight to the supposed intentions of the

parties or the object and purpose of the treaty than to the actual text of the treaty. Instead, the Tribunal should apply the ordinary meaning terms of the treaty in their context, as well as the 31 July 2001 Interpretative Note as written.[1]

Similarly, the Tribunal has no jurisdiction to supplement or otherwise expand upon the rights and obligations contained in the NAFTA. An international arbitral tribunal does not possess jurisdiction to legislate new rights and obligations that the sovereign States have not seen fit to create[2].

II. GOVERNMENT PROCUREMENT MEASURES

Mexico disagrees with the Claimant that the U.S. national law forbidding states from purchasing foreign-processed steel in certain circumstances, and the interpretation of that law by the U.S. national government, can somehow be characterized as unrelated to government procurement.

Mexico agrees with the United States that the measures complained of by the Claimant relate to the treatment of goods in a government procurement context, not investments, and therefore are not within the scope of Chapter Eleven. Section B of Chapter Eleven permits a qualifying investor to commence an arbitral claim only with respect to measures that are alleged to breach Section A of Chapter Eleven. For that reason, this Tribunal has no jurisdiction to consider what is in reality a complaint about U.S. government procurement practices.

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[1] Jennings and Watts have commented:

> That such a textual approach ... is an accepted part of customary international law is suggested by many pronouncements of the International Court of Justice, which has also emphasized that interpretation is not a matter of revising treaties or of reading into them what they do not expressly or by necessary implication contain ....

Jennings and Watts, Eds., Oppenheim's International Law (9th Ed. 1996) at 1271 (footnotes omitted).

[2] The World Trade Organization's Dispute Settlement Understanding is typical in expressing this concern. Article 3, entitled General Provisions, states in this regard:

> 2. The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. The Members recognize that it serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law. Recommendations and rulings of the DSB [the Dispute Settlement Body] cannot add to or diminish the rights and obligations provided in the covered agreements. [Emphasis added.]

In addition, Mexico notes that Article 1112 provides that "In the event of any inconsistency between this Chapter and another Chapter, the other Chapter shall prevail to the extent of the inconsistency". Thus, even if Chapter Eleven could be construed to prohibit measures that are authorized by other Chapters, there would be a resulting inconsistency that must be resolved in favor of the other Chapters.

III. INTERPRETATION OF ARTICLE 1105

The FTC Interpretative Note has confirmed that Article 1105 refers to the rules of customary international law. Article 38 of the Statute of the International Court of Justice describes customary international law as:

> (b) international custom, as evidence of a general practice accepted as law; [Emphasis added].

Customary international law results from the accretion and broadening of State practice until it assumes widespread acceptance. It usually takes many years to accrete and almost always lags behind the development of conventional international law (*i.e.*, treaties). For example, if the NAFTA were not in effect, Mexico would have no customary international law obligation to accord national treatment to investors of the United States or Canada, even though the obligation of national treatment is included in many multilateral and bilateral treaties. National treatment is not yet a rule of customary international law.[3]

To determine the content of customary international law, the International Court of Justice looks to the *opinio juris* of States: that is, whether States by their conduct evidence a willingness to be bound by the rule of law that is being propounded.[4] This requires the survey of many States and many different legal systems. While complete uniformity is not required, substantial uniformity is. Generally States do not quickly acknowledge the existence of a new customary rule of international law. Thus, only settled and well-accepted legal principles fall within this category of international law.

As discussed above, there clearly is not an established state practice of according national treatment to foreign products in government procurements; to the contrary, only a minority of the world's nations have even entered into treaties imposing such national treatment obligations, and

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[3] A further example is the proposed accession of the People's Republic of China to the World Trade Organization. Even though 142 States are Members of the WTO (as of July 2002), and therefore WTO rules such as the obligation to accord national treatment and most-favored nation treatment to goods of other countries bind the vast majority of the international community, until China formally accedes it is not entitled to the benefit of such rules nor must it accord such treatment to the goods of other WTO Members.

[4] See Georg Schwarzenberger, *International Law as Applied by International Courts and Tribunals*, 3rd ed., (Stevens & Sons Limited: London, 1957) at pp. 38-43. Ian Brownlie, *Principles of Public International Law* (5th ed., 1998) at ps. 7-11.

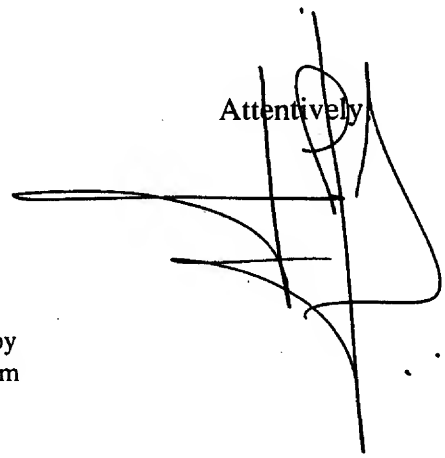
those nations have not agreed to accord national treatment unconditionally. Further, there is no customary international law on a rule of origin that must be applied in determining whether products are of foreign origin. Mexico also agrees with the United States that there is no rule of customary international law mandating the procedures by which regulations are adopted.

Finally, if the Claimant in fact is asking for a determination from the Tribunal that the U.S. law must be interpreted to allow at least some processing of the steel products to take place abroad, the Claimant is inappropriately seeking that the Tribunal apply U.S. domestic law as a court of appeal. In an article that a previous NAFTA Tribunal has cited with approval, Eduardo Jiménez de Aréchaga, a former president of the International Court of Justice, wrote:

> It is not for an international tribunal to act as a court of appeal or of cassation and to verify in minute detail the correct application of municipal law. The essential business of an international tribunal in these cases is to see whether gross injustices have been committed against an alien and, if so, whether the three indicated requirements are present. The angle of examination is different from that of an appeal judge: it is not the grounds invoked by the domestic tribunal which must be scrutinized, but rather the result of the decision which must be evaluated, taking into account the elements of justice and equitable consideration.[5]

Accordingly, this Tribunal does not sit as a court of appeal but rather as an international tribunal with a different governing law and jurisdiction. In considering any allegation of a denial of fair and equitable treatment, the Tribunal must examine the respondent's legal system as a whole, including the means provided by that system to do justice on its own. This "angle of examination" is different from that of the domestic courts.

Attentively,



c.c. Peter E. Kirby
Barton Legum

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[5] Eduardo Jiménez de Aréchaga, "International Law in the Past Third of a Century," 159 Receuil des Cours I, at p. 282. This article was cited with approval by the Tribunal in *Robert Azinian et al.* v. *United Mexican States*, ICSID Case No. ARB(AF)/97/2 at paragraph 98.